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AGENCY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANTA CLARITA VALLEY
WATER AGENCY,

Plaintiffs,

vs.

WHITTAKER CORPORATION,
Defendants

Case No. 2:18-CV-6825-SB (RAOx)

**DEFENDANT WHITTAKER
CORPORATION MOTION IN
LIMINE NUMBER 3 TO
PRECLUDE SCVWA FROM
CALLING WHITTAKER'S
EXPERTS IN ITS CASE IN CHIEF**

PTC Date: August 6, 2021
Time: 10:00 a.m.
Dept: 6C

TRIAL DATE: August 24, 2021

1 Defendant WHITTAKER CORPORATION (“Whittaker”) moves the Court
2 for an order precluding SANTA CLARITA VALLEY WATER AGENCY
3 (“SCVWA”) from calling Whittaker’s expert witnesses in SCVWA’s case in chief
4 or to exclude any cross-examination of the experts on the same subject.

5 **I. MOTION**

6 Rule 611 of the Federal Rules of Evidence mandates that “the court should
7 exercise reasonable control over the mode and order of examining witnesses and
8 presenting evidence so as to:

- 9 (1) make those procedures effective for determining the truth;
10 (2) avoid wasting time; and
11 (3) protect witnesses from harassment or undue embarrassment.”

12 SCVWA’s witness list states that it plans to call these experts retained by
13 Whittaker - Gaynor Dawson, Gary Hokkanen, Peter Mesard and Steven Luis. It is
14 unclear whether SCVWA will seek live testimony or will play video excerpts of
15 their deposition testimony. If SCVWA expects the experts to appear in person then
16 it is forcing them to appear twice. Once in SCVWA’s case in chief and again in
17 Whittaker’s case. This is disfavored. *Lis v. Robert Packer Hosp.*, 579 F.2d 819,
18 823 (3d Cir. 1978).

19 If their deposition video is played, it would be unfair to also allow SCVWA
20 to cross examine the expert on the same issues. That would give SCVWA
21 essentially to bites at the same apple. The scenario where a video clip that is played
22 in the case in chief is then replayed in cross-examination does not stretch the
23 imagination.

24 The order of presentation of evidence requested by SCVWA is time-wasting,
25 discourteous to experts, confusing to the jury, and in violation of the spirit of FRE
26 611.

1 **II. OPPOSITION TO MOTION:**

2 Yes, Plaintiff may present testimony of one or more of Whittaker's disclosed
3 experts in its case-in-chief because, once an expert is disclosed, ***either party may***
4 ***call him or her at trial***. Whittaker's Motion in Limine No. 3 is frivolous and
5 ignores authority directly on point, including the leading case decided by Judge
6 Easterbrook of the Seventh Circuit:

7 A witness identified as a testimonial expert is available to either side; such a
8 person can't be transformed after the report has been disclosed, and a deposition
9 conducted, to the status of a trial-preparation expert whose identity and views
10 may be concealed. . . . Disclosure of the report ends the opportunity to invoke
11 confidentiality.

12 *S.E.C. v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009)(holding the non-disclosing
13 party need not even provide notice of its intent to call the opposing party's expert to
14 testify at trial); *Hartford Fire Insurance Company, Inc. v. Transgroup Express,*
15 *Inc.*, 264 F.R.D. 382, 383 (N.D. Ill. 2009)(holding a party could not re-designate a
16 testifying expert as a non-testifying after the expert's deposition was scheduled, but
17 before it was conducted, and after the expert's reports were disclosed); *House v.*
18 *Combined Ins. Co. of America*, 168 F.R.D. 236 (N.D. Iowa 1996) (holding that
19 once a party designates and discloses a trial expert, even if that designation is
20 withdrawn, the opposing party may depose the expert and call that expert at trial).

21 Whittaker provides no basis for its almost silly concern that it would be
22 discourteous to the experts to require that they testify in Plaintiff's case-in-chief.
23 Whittaker provides no basis for its argument that the jury would be confused;
24 certainly the parties and their counsel should expect that jurors in the Central
25 District of California are no more likely to be confused than jurors in Iowa, Illinois
26 or Nebraska.

27 The fact is Whittaker's experts disagree on key factual issues regarding the
28 scope, source and migration of contamination at the Whittaker site. It would be

1 very helpful for the jury, and not the least bit confusing, for example, to hear
 2 expert Gary Hokannen explain that VOCs and perchlorate are generally found in
 3 the same locations at the Whittaker site, enter the groundwater in the same manner,
 4 and generally follow the same pathways once in the groundwater. And far from
 5 wasting time, once the jury hears this well-grounded and insightful testimony,
 6 Whittaker may decide not to present contradictory testimony from its other experts,
 7 thereby *shortening* the trial.

8 Finally, *Lis v. Robert Packer Hosp.*, 579 F.2d 819, 823 (3d Cir. 1978) does
 9 not actually support Whittaker's motion because there the Third Circuit held that a
 10 trial judge whose courtroom practice permitted cross-examination to exceed the
 11 scope of direct for every witness in every case ran afoul of FRE 611; on the other
 12 issue before the Court, however, calling a witness out of order, the court found no
 13 error. Indeed, the Third Circuit's decision is consistent with subsequent decisions
 14 holding that either side may call a disclosed expert at trial: Thus, although calling
 15 a defense witness out of turn for reception of his **testimony during the plaintiff's**
 16 **case in chief** may technically disrupt the normal presentation of the case, this
 17 decision is committed to the discretion of the trial court. *Lis v. Robert Packer*
 18 *Hosp.*, 579 F.2d at 823 (emphasis added).

19 It would unfairly prejudice Plaintiff to prevent it from calling experts
 20 disclosed by Whittaker, including Mr. Hokkanen (or playing a portion of his
 21 video), during Plaintiff's case-in-chief. Whittaker's request for a blanket exclusion
 22 of designated, disclosed and deposed experts should be denied.

23 Date: July 19, 2021

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 BYRON GEE
 PATRICK J. RICHARD
 RAVEN McGUANE

27 By: /s/ Patrick J. Richard
 Patrick J. Richard

Attorneys for Plaintiff SANTA
CLARITA VALLEY WATER
AGENCY

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1 **REPLY TO OPPOSITION TO MOTION**

2 **I. INTRODUCITON**

3 The Motion in Limine requested that SCVWA be barred from calling
4 Whittaker's expert witnesses in their case in chief or to exclude any cross-
5 examination of the experts on the same subject. SCVWA's opposition challenged
6 the first part of the motion, but ignored the alternative request to exclude any cross-
7 examination of the experts on the same subject.

8 If SCVWA desires to call Whittaker's experts in their case in chief that
9 should be their opportunity to examine the witness. They should not be able to go
10 over the same or similar testimony when the expert is recalled in Whittaker's case.
11 There should be only one bite at the proverbial apple.

12 This does not ignore that it would be unfair to have the expert attend the trial
13 twice. Live appearances would be necessary since there is no basis for declaring
14 the experts unavailable, which makes the deposition testimony inadmissible
15 hearsay under FRE 801(b)(1), FRCP 32(a). Whittaker's experts should not have to
16 appear twice.

17 **II. ARGUMENT**

18 Whittaker is not arguing that any result on this Motion is required, but that
19 the resolution is in the sound discretion of the Court. That discretion should not be
20 exercised so that experts have to appear once or be subject to cross examination
21 once.

22 Even assuming that experts should have to come to Court twice, it would be
23 unfair for SCVWA to be able examine them once in their case in chief and then
24 repeat that examination after the same expert is called as part of Defendants case.
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1 Dated: July 23, 2021

BASSI EDLIN HUIE & BLUM

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3
4 By: /s/ Michael E. Gallagher
FRED M. BLUM
MICHAEL E. GALLAGHER
5 Attorneys for Defendant and Third-Party
6 Plaintiff WHITTAKER
CORPORATION
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1 **Re: Santa Clarita Valley Water Agency v. Whittaker Corporation**
2 **United States District Court, Central District Case No. 2:18-cv-6825-**
3 **GW (RAOx)**

4 **PROOF OF SERVICE – ELECTRONIC TRANSMISSION**

5
6 STATE OF CALIFORNIA/COUNTY OF San Francisco

7 I am a citizen of the United States and an employee in the County of San
8 Francisco. I am over the age of eighteen (18) years and not a party to the within
9 action. My business address is BASSI, EDLIN, HUIE & BLUM LLP, 500
10 Washington Street, Suite 700, San Francisco, California 94111.

11
12 On July 23, 2021, I electronically served the document(s) via USDC
13 CDCA ECF website, described below, on the recipients designated on the
14 Transaction Receipt located on the USDC CDCA ECF website.

15
16 **DEFENDANT WHITTAKER CORPORATION MOTION IN LIMINE**
17 **NUMBER 3 TO PRECLUDE SCVWA FROM CALLING WHITTAKER'S**
18 **EXPERTS IN ITS CASE IN CHIEF**

19 On the following parties:

20 PLEASE SEE SERVICE LIST PROVIDED BY USDC CDCA WEBSITE

21
22 I declare under penalty of perjury that the foregoing is true and correct and
23 that this document is executed on July 23, 2021, at San Francisco, California.

24
25
26 /s/ Bridgette C. Burdick

27 BRIDGETTE C. BURDICK
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